***Jarrett v. Lockyer*, Case No. 05-56260**
D.W. Nelson, Senior Circuit Judge, concurring:

I agree with my colleagues' conclusion that the deferential AEDPA standard of review precludes relief in the instant case. There is simply no federal law explaining that it is inappropriate and unconstitutional to—on multiple occasions—permit the jury to take home child pornography.[1] I part company, however, with my colleagues' conclusion that the error that occurred here not only is amenable to harmless error review but was, in fact, harmless.

What we have before us is akin to the trial judge sending the jury home with the murder weapon in a murder case or heroin in a drug trafficking case: Jarrett was on trial for sending "harmful matter" to a minor, and the trial court allowed the jury to take home copies of the "harmful matter"—exhibits containing more than 60 pages of explicit instant message transcripts and approximately 25 explicit pornographic photographs, some of which allegedly depicted children. Then, the trial court permitted the jury to take the exhibits home on *two subsequent occasions*, once upon the request of a juror. I think it is obvious that the trial court committed constitutional error, and I am convinced that its error was structural.

The Supreme Court has been clear that certain constitutional errors "defy

[1] Of course, "[i]f no such case exists, it is because [the error] contradicts the character of a trial." *Standen v. Whitley*, 994 F.2d 1417, 1422 (1993).

analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Errors of this type—so-called "structural errors"—cannot "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 308; *see also United States. v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2563-64 (2006) (noting that "trial errors" are those that both occur during the presentation of evidence *and* can be quantitatively measured).

Although, the error here occurred during the presentation of the evidence, I can discern no reasoned fashion in which to assess *quantitatively* the effect of the trial court's error. When this occurs we are forced to conclude that the error is structural. *See Gonzalez-Lopez*, 126 S.Ct. at 2564 n.4 ("[A]s we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error"); *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) (holding that an error "the consequences of which [we]re necessarily unquantifiable and indeterminate, is certainly a "structural defec[t] in the constitution of the trial mechanism"). Indeed, the very fact that the appellate court is unable to gauge the effect of a trial error, renders that trial "an unreliable vehicle for determining guilt or innocence." *Washington v. Recuenco*, 126 S.Ct. 2546, 2551 (2006).

Repeatedly allowing the jury to take home highly inflammatory evidence that was the instrumentality of the crime for which Jarrett was on trial constitutes

structural error. Although AEDPA prevents relief in the instant case, "federal courts, even on habeas, have an independent obligation to say what the law is." *Williams v. Taylor*, 529 U.S. 362, 411 (2000) (O'Connor, J., concurring).